In the Court of Appeals for the
Third District of Texas
Nos. 03-18-00207-CR; 03-18-00208-CR

Ex parte Scott Ogle	On Appeal from County Court at Law No. 2 Hays County, Texas Trial Court Cause Nos. 17-3191CR; 17-3192CR

Brief for Appellant

Oral argument requested.

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May 29, 2018

Statement Regarding Oral Argument

This case involves allegations that Appellant committed a crime by criticizing public servants for how they did their jobs. Appellant requests oral argument pursuant to Texas Rule of Appellate Procedure 39.7.

Names of All Parties

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Hon. David Glicker	Judge, County Criminal Court at Law No. 2, Hays County, Texas

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Brief for Appellant

To the Honorable Court of Appeals:

Statement of the Case

Scott Ogle appeals the trial court's denial of relief on the merits on the facial overbreadth and vagueness claims in his *Application for Writ of Habeas Corpus and Brief in Support.* Clerk's Record in Cause Number 17-3191CR ("CR-3191") 32–44 (application), 45 (*Order Denying Writ of Habeas Corpus and Motion to Quash Information*); Clerk's Record in Cause Number 17-3192CR ("CR-3192") 32–44 (application), 45 (order).

Procedural History

On August 18, 2017, Mr. Ogle was charged by two *Informations* with Harassment under section 42.07(a)(7) of the Texas Penal Code (CR-3191 8; CR-3192 8).

On January 8, 2018, Mr. Ogle filed his *Application for Writ of Habeas Corpus, Motion to Quash Information and Brief in Support* under article 11.09 of the Texas Code of Criminal Procedure, challenging the *Information* filed against him in each case as unlawful on the grounds that section 42.07(a)(7) is facially overbroad and vague, in violation of the First Amendment of the United States Constitution (CR-3191 32–44; CR-3192 32–44).

On February 12, 2018 the trial court denied Mr. Ogle's *Application for Writ of Habeas Corpus* (CR-3191 45; CR-3192 45).

On February 23, 2018, Mr. Ogle filed his *Notice of Appeal and Designation of Record* (CR-3191 46; CR-3192 46).

On April 12, 2018, the trial court entered its certification of Defendant's right to appeal (CR-3191 49; CR-3192 48).

Issue Presented

Section 42.07(a)(7) of the Texas Penal Code violates the First Amendment to the United States Constitution.

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Statement of Facts

The operative facts are procedural, and are as stated in the *Procedural History* and reflected in the Clerk's Records.

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Summary of the Argument

Appellant is charged in two *Informations* as follows:

> …Scott Ogle did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass Lt. Skrocki, send repeated electronic communications to Lt. Skrocki in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: repeated phone calls, calls for service, emails, and/or subpoenas many of which contained offensive or disparaging language.

and

> …Scott Ogle did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass Officer Paris, send repeated electronic communications to Officer Paris in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: repeated phone calls, calls for service, and/or emails many of which contained offensive or disparaging language.

CR-3191 8; CR-3192 8. These are allegations under section 42.07(a)(7) of the Texas Penal Code, which provide:

> A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person … sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Tex. Penal Code § 42.07(a)(7). This is a content-based restriction on speech. It must face strict scrutiny, which it fails because it restricts a real and substantial amount of protected speech.

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Argument

Point of Error One: Section 42.07(a)(7) is facially overbroad under the First Amendment to the United States Constitution.

Figure 1 shows the analysis that the Supreme Court applies in facial challenges under the Free Speech Clause of the First Amendment.

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Section 42.07(a)(7) restricts speech.

First, of course, to implicate the Free Speech Clause the statute must restrict speech, including expressive conduct. "The First Amendment affords protection to symbolic or expressive conduct as well as to

actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003). If the statute does not restrict speech it does not implicate the Free Speech Clause.

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Section 42.07(a)(7) does not restrict commercial or professional speech.

Where, as here, the statute restricts speech, the Court asks whether the speech restricted is commercial (or perhaps professional[1]) speech. Commercial-speech restrictions (and perhaps professional-speech restrictions) must only satisfy intermediate scrutiny. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

Commercial speech is "speech that does no more than propose a commercial transaction." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014). Section 42.07(a)(7) is not limited to commercial speech, and in fact the speech here is not commercial speech. The speech here was speech to public servants, in their capacity as public servants (the complainants are described by their ranks in the *Informations*, and the

[1] The standard that content-based restrictions on professional speech must meet is an open question, not germane here.

manners and means listed include "calls for service" and "subpoenas").

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Section 42.07(a)(7) restricts speech based on its content.

Where, as here, the statute restricts noncommercial speech, the Court asks whether the statute restricts speech based on its content. *McCullen v. Coakley*, 134 S.Ct. 2518, 2530 (2014). If it does not—if, that is, the statute is a content-neutral rather than content-based restriction, the statute must only satisfy intermediate scrutiny. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010).

In *Reed v. Town of Gilbert* the United States Supreme Court held:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed v. Town of Gilbert, Ariz., 135 S.Ct. 2218, 2227 (2015).

Here is that "more subtle" sort of facial distinction based on a message: Section 42.07(a)(7) defines the regulated speech by its *function* ("reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another") and its *purpose* ("intent to harass,

annoy, alarm, abuse, torment, or embarrass another").[2] It is a distinction drawn based on the message the speaker conveys and wants to convey, and therefore is subject to strict scrutiny.

Furthermore, the *Informations* show the State's intent to apply section 42.07(a)(7) based on the content of the communications, "many of which contained offensive or disparaging language."

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Section 42.07(a)(7) restricts a real and substantial amount of protected speech based on its content.

Where, as here, the statute restricts speech based on its content, the Court asks whether the statute restricts a real and substantial amount of protected speech, in relation to the unprotected speech that it restricts. *New York v. Ferber*, 458 U.S. 747 (1982).

"From 1791 to the present … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations."

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[2] *Scott v. State*, discussed more fully below at 9, found that speech intended to inflict emotional distress and reasonably likely to inflict emotional distress is "essentially noncommunicative." *Scott v. State*, 322 S.W.3d 622, 669–70 (Tex. Crim. App. 2010). To the contrary, according to *Reed v. Town of Gilbert* (decided five years after Scott) that *purpose* and that *function* render the statute content based.

United States v. Stevens, 559 U.S. 460, 468 (2010) (internal modifications omitted). "[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar." *United States v. Alvarez*, 567 709, 717 (2012) (internal modifications omitted) (*citing U.S. v. Stevens*).

These categories, as the Supreme Court has described them, include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, "fighting words," child pornography, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 567 U.S. at 717.

There exists no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010).

The speech restricted by section 42.07(a)(7) falls into none of the recognized unprotected categories, and so is protected. Any unprotected speech (that is, speech in one of these unprotected categories) that the statute captures is incidental.

Section 42.07(a)(7) fails strict scrutiny.

Where, as here, the statute restricts a real and substantial amount of protected speech, the inquiry ends. The Court does not consider whether there is a governmental interest in restricting the speech. The restriction is void. *See United States v. Stevens*, 559 U.S. at 482 ("We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment").

This operation—determining that the restriction is substantially overbroad and holding it invalid—is strict scrutiny. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 792 fn.1 (2011). If a statute is not narrowly tailored, the Court does not need to consider whether there is a compelling governmental interest behind it, and so it does not.

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The State's allegations here support the overbreadth argument.

While the underlying facts are not relevant to an overbreadth challenge, the State's allegations are. Here the State accuses Mr. Ogle of making annoying electronic communications to "Lt. Skrocki" and "Officer Paris," two public servants. The right to annoy public

servants is protected not only by the Free Speech Clause, but also by the Redress of Grievances Clause of the First Amendment.

The specific communication Mr. Ogle is accused of making to Lt. Skrocki is "but have been your typical arrogant, condescending, belligerent self who chooses to look the other way." CR-3191 18. The specific communication Mr. Ogle is accused of making to Officer (or "Deputy") Paris include calling him a "little bitch" and a "little state weasel" and telling him, "You have a Constitution to uphold, son, you're pissing on it." CR-3192 10. Such blunt criticisms of public servants for their deficient performance of their duties are not only not unprotected speech, but they are at the beating heart of the First Amendment.

A statute such as section 42.07(a)(7) that allows someone to be prosecuted for such speech cannot survive constitutional scrutiny.

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Scott v. State *does not control.*

In *Scott v. State* the Court of Criminal Appeals upheld the portion of section 42.07 pertaining to telephone calls, and found that it did not "implicate the free-speech guarantee of the First Amendment" because it "is not susceptible of application to communicative conduct

that is protected by the First Amendment." *Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010). This ruling is not controlling on this Court for three reasons.

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First, the *Scott* court did not have the benefit of recent developments in Supreme Court free-speech jurisprudence.

The Court of Criminal Appeals in *Scott* did not take into account the Supreme Court's post-2009 free-speech caselaw, which radically clarified the rules for determining whether a statute was invalid as a content-based restriction on speech. The Court of Criminal Appeals did not have the benefit of *Alvarez* or *Reed*, and did not acknowledge *Stevens*. The Supreme Court's analysis described in Figure 1 did not play into the Court of Criminal Appeals' decision in *Scott*.

Stevens, decided just before *Scott*; and *Alvarez*, decided two years later, stand for the proposition that all speech outside of recognized categories of historically unprotected speech is protected. Please see the discussion above at 8. "Communicative conduct … that invades the substantial privacy interests of another in an essentially intolerable

manner," which *Scott* described as unprotected speech, *Scott* at 669, is not one of these categories.[3]

Reed, decided five years after *Scott*, stands for the proposition that a restriction is content based if the restriction is based on the function (in section 42.07(a)(7), the "reasonably likely" effect) or purpose (in section 42.07(a)(7)) of the speech. Please see the discussion above at 6.

In light of recent developments in Supreme Court free-speech caselaw, Scott's "does not implicate" analysis is incorrect. A restriction *implicates* the Free Speech Clause if it restricts speech or communicative conduct. It may in the end—because it is content neutral or because it satisfies strict scrutiny, for example—be a valid restriction, but it cannot wholly evade First Amendment review.

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Second, section 42.07(a)(7) is much broader than section 42.07(a)(4).

As Presiding Judge Keller wrote in her dissent to the refusal of discretionary review in *Ex parte Reece*,

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[3] The "essentially intolerable manner" language comes from dicta in *Cohen v. California*, 403 U.S. 15, 21 (1971). Neither in *Cohen* nor in any other case in the following 47 years did the Supreme Court hold that speech was unprotected because it invaded substantial privacy interests in an essentially intolerable manner.

> The provision at issue in Scott was "directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy." By contrast, the electronic communications provision sweeps within its reach any electronic communication, regardless of whether that communication is directed at a particular person or infringes on the person's privacy[.]"

Ex parte Reece, 517 S.W.3d 108, 108 (Tex. Crim. App. 2017) (Keller, PJ, dissenting to refusal of discretionary review).

Here, for example, Mr. Ogle is accused (among other alternative theories of the case) of repeatedly making *calls for service* to two public servants, and *subpoenas* to one, with the intent to annoy them. The *Arrest Warrant Affidavits* reveal that some of the complained-of communications were made to "the Hays County Sheriff's Office." CR-3191 9–10; CR-3192 9–10. Annoying public servants in their capacity as public servants[4] is constitutionally protected by both the Free Speech Clause and the Redress of Grievances Clause, but is conduct forbidden by section 42.07(a)(7).

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[4] Please see the discussion above at 10 of the specific language allegedly used.

Third, *Scott v. State* should be reexamined.

For the reasons described by Presiding Judge Keller in her dissent to the refusal of discretionary review in *Reece*, the *Scott* decision is "ripe for re-examination." *Ex parte Reece*, 517 S.W.3d at 108.

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Conclusion

Because section 42.07(a)(7) restricts a real and substantial amount of protected speech based on its content, and because it restricts the right to petition the government for redress of grievances, it is facially unconstitutional under the First Amendment.

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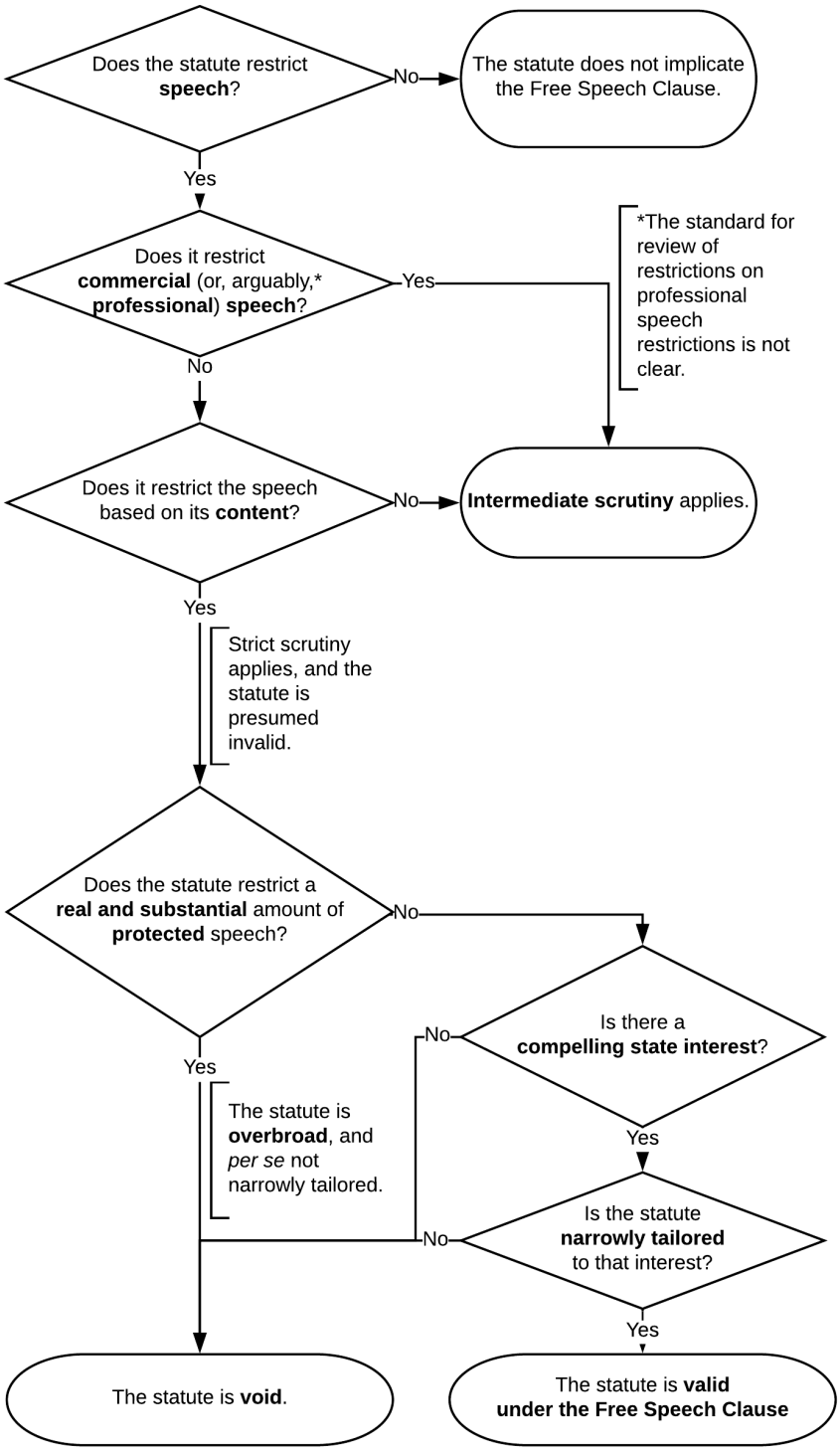
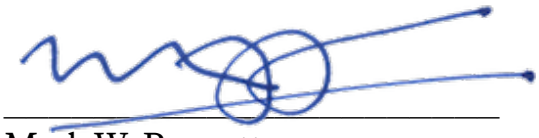


Figure 1: The Supreme Court's Analysis for Facial Challenges

Prayer for Relief

For these reasons, Mr. Ogle asks this Court to reverse the trial court's denial of habeas relief and remand the case to the trial court with orders that relief be granted.

Respectfully Submitted,



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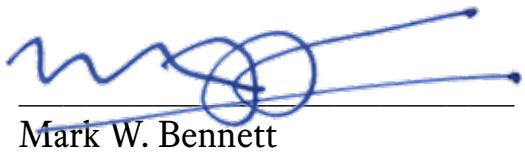
Certificate of Service and Compliance

A copy of this Brief for Appellant has been served upon the State of Texas by electronic filing on May 29, 2018. According to Microsoft Word's word count, this brief contains 2,030 words, not including the: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.



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